No. 75-679

In the Supreme Court of the United States

OCTOBER TERM, 1975

INTERNAL REVENUE SERVICE, PETITIONER

v.

FRUEHAUF CORPORATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

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OPINIONS BELOW

The memorandum opinion of the district court (Pet. App. A 1A–6A; A. 47–51) is reported at 369 F. Supp. 108. The subsequent injunctive order of the district court is set forth at Pet. App. A 7A–12A and A. 52–57. The opinion of the court of appeals (Pet. App. B 13A–27A; A. 78–90) is reported at 522 F. 2d 284.

JURISDICTION

The judgment of the court of appeals was entered on June 9, 1975 (Pet. App. C 28A). A timely petition for rehearing was denied on August 8, 1975 (Pet.

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App. D 29A). The petition for a writ of certiorari was filed on November 6, 1975, and was granted on January 12, 1976 (A. 102). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Exemption 3 of the Freedom of Information Act bars disclosure of "matters that are * * * specifically exempted from disclosure by statute." The question presented is whether this exemption covers Internal Revenue Service letter rulings, technical advice memoranda and related files because of the prohibition in 26 U.S.C. 6103 against public inspection of returns, where such documents contain information which is either part of or related to returns filed by particular taxpayers.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Freedom of Information Act, 5 U.S.C. 552; 18 U.S.C. 1905; Sections 6103 and 7213 of the Internal Revenue Code of 1954 (26 U.S.C.); and Treasury Regulations on Procedure and Administration (1954 Code), Section 301.6103(a)–1 (26 C.F.R.) are set forth in the Appendix, *infra,* pp. 40–45.

STATEMENT

1. Respondent Fruehauf Corporation manufactures trucks and their parts and accessories. It is accordingly subject to the federal excise tax upon manufacturers of automobile and truck chassis and bodies, and their parts and accessories, imposed by Section 4061 of the Internal Revenue Code of 1954, and required to file quarterly returns as provided by Treasury Regulations on Manufacturers and Retailers Excise Taxes (1954 Code), Section 48.6011(a)–1 (26 C.F.R.).

The manufacturer's excise tax is a prescribed percentage of the manufacturer's sales price of taxable articles. For purposes of the excise tax provisions, Section 4216(a) of the Code defines price to include certain packing and transportation charges. Section 4216(b) provides for computation of the tax on the basis of a constructive sales price if the manufacturer sells: (1) at retail, (2) on consignment, (3) at less than the fair market value (unless in an arm's length transaction), or (4) to a related distributor in the case of automobiles and trucks.

After a nonjury trial in the United States District Court for the Eastern District of Michigan, respondents Fruehauf Corporation and two of its officers, William E. Grace and Robert D. Rowan were convicted [1] of conspiracy (1) to defraud the United States by defeating the assessment of the Section 4061 federal manufacturer's excise tax; (2) to attempt to evade such excise taxes of $12,344,587, for the period October 1, 1956 to December 31, 1965, in violation of 26 U.S.C. 7201; and (3) to aid and advise in the preparation of materially false and fraudulent excise tax returns filed by Fruehauf Corporation for such

[1] Respondents were adjudged guilty in July, 1975. The district court has postponed sentencing pending its disposition of respondents' motions for a new trial. The findings of the district court in the criminal case are unofficially reported at 36 A.F.T.R. 2d 5979 (July 17, 1975).

periods which understated Fruehauf's excise tax liability by $12,344,587, in violation of 26 U.S.C. 7206(2) (Pet. App. A 1A–2A).

During pretrial discovery proceedings in the criminal case, respondents had sought to obtain from the government various documents in the possession of the Internal Revenue Service. These documents consisted principally of private letter rulings issued to various taxpayers with respect to their Section 4061 manufacturer's excise tax liability for trucks and automotive parts and the computation of their sales price under Section 4216, the credit for tires under Section 6416 (c), and related matters. The government responded that such material was not subject to discovery under the Federal Rules of Criminal Procedure and the district court denied respondents' discovery request (A. 15–17).

2. Prior to the trial of the criminal case, respondents commenced this action in the United States District Court for the Eastern District of Michigan under the Freedom of Information Act (FOI Act), 5 U.S.C. 552, seeking copies of various documents submitted to and prepared by the Internal Revenue Service between January 1, 1947 and September 13, 1973 (the date of the complaint). These documents related to the Internal Revenue Service's determinations with respect to whether particular vehicles were subject to the manufacturer's excise tax, and its methods of computation of the sales price of such vehicles and related articles. Specifically, respondents sought (Pet. App. A 2A–3A; A. 9–14, 48–49):

(1) all "unpublished private rulings and/or letter rulings" issued by the Excise Tax Branch, Internal Revenue Service since January 1, 1947 to manufacturers of automobile and truck chassis and bodies, involving any of a number of specified determinations with respect to price, constructive price, and coverage under Sections 4216, 4061, and 6416 of the Code;

(2) Internal Revenue Service files, including correspondence, analysis and submissions of fact applicable to 23 published Revenue Rulings;[2]

(3) communications received by the Internal Revenue Service from persons outside the executive branch of the government with respect to the requested private letter rulings;

(4) so much of the Internal Revenue Service's letter ruling indexing system as would enable respondents to determine whether additional similar letter rulings have been issued by the Service.

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[2] The published Revenue Rulings with respect to which correspondence, analysis, and submissions of fact were demanded, were as follows: Rev. Rul. 62–68, 1962–1 Cum. Bull. 216; Rev. Rul. 68–254, 1968–1 Cum. Bull. 479; Rev. Rul. 68–202, 1968–1 Cum. Bull. 477; Rev. Rul. 68–519, 1968–2 Cum. Bull. 513; Rev. Rul. 69–394, 1969–2 Cum. Bull. 206; Rev. Rul. 54–25, 1954–1 Cum. Bull. 258; Rev. Rul. 54–448, 1954–2 Cum. Bull. 412; Rev. Rul. 54–61, 1954–1 Cum. Bull. 259; Rev. Rul. 283, 1953–2 Cum. Bull. 425; Rev. Rul. 62–221, 1962–2 Cum. Bull. 251; Rev. Rul. 63–238, 1963–2 Cum. Bull. 519; Rev. Rul. 58–287, 1958–1 Cum. Bull. 426; Rev. Rul. 60–241, 1960–2 Cum. Bull. 329; Rev. Rul. 59–74, 1959–1 Cum. Bull. 350; Rev. Rul. 59–163, 1959–1 Cum. Bull. 353; Rev. Rul. 65–9, 1965–1 Cum. Bull. 491; Rev. Rul. 60–185, 1960–1 Cum. Bull. 412; Rev. Rul. 69–580, 1969–2 Cum. Bull. 209; Rev. Rul. 69–568, 1969–2 Cum. Bull. 209; Rev. Rul. 71–240, 1971–1 Cum. Bull. 372; Rev. Rul. 68–509, 1968–2 Cum. Bull. 508; Rev. Rul. 70–54, 1970–1 Cum. Bull. 218; Rev. Rul. 73–231, 1973–1 Cum. Bull. 427. Twenty

Respondents' complaint specified that the term "private rulings and/or letter rulings" was meant to include "(without limitation) both ordinary letter rulings, unpublished private rulings, and those portions of the responses to Technical Advice requests that are or were intended for issuance to taxpayers" (A. 11). Respondents thereafter moved for a preliminary injunction against the Internal Revenue Service's further withholding of the documents they demanded (A. 25–26).

The Internal Revenue Service moved for summary judgment on the ground that the requested documents were exempt from disclosure under Exemption 3 of the FOI Act, 5 U.S.C. 552(b)(3), as "matters that are * * * specifically exempted from disclosure by statute." The Service relied upon Section 6103 of the Internal Revenue Code of 1954 as the statute barring disclosure. That statute provides that tax returns shall be open to public examination only to the extent authorized in rules and regulations promulgated by the President (A. 33).

At an evidentiary hearing held by the district court on the respective motions of the parties (A. 2), the Internal Revenue Service submitted affidavits of three

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of the 23 Revenue Rulings are devoted, wholly or in part, to determinations under Section 4216, on facts set forth for illustrative purposes, of price or constructive price on which the excise tax imposed by Section 4061 was to be computed. The remaining three Revenue Rulings (Rev. Ruls. 60–185, 70–54, and 73–231) involved determinations whether particular articles manufactured and sold as described were subject to the manufacturer's excise tax.

of its high-ranking officials. These affidavits (A. 39–46) described the nature of the documents requested by respondents and the Service's policy with respect to such documents.

Singleton B. Wolfe, the Director of the Audit Division, stated in his affidavit that a "'ruling' is a written statement issued to a taxpayer or his authorized representative by the National Office which interprets and applies the tax laws to a specific set of facts" (A. 39). See Statement of Procedural Rules, Section 601.201(a)(2) (26 C.F.R.). He described a "technical advice memorandum" requested by respondents as an expression of the views of the Service as to the application of the law to the facts of a specific case. These memoranda are furnished by the National Office upon the request of a district director in connection with the examination of a taxpayer's return or consideration of a claim for refund. See Statement of Procedural Rules, Section 601.105(b)(5)(i). Wolfe explained that the Internal Revenue Service prohibits its employees from relying upon rulings or technical advice memoranda as precedent in the disposition of other cases. He further stated that such documents are made available within the Internal Revenue Service only for use in connection with the determination of the tax liability of the taxpayers to whom they apply (A. 39–42).

The second affidavit, of John F. Simmons, Chief of the Field Liaison and Technical Manual Section, confirmed that none of the rulings or technical advice memoranda are circularized to the Service's field offices. He explained that a copy of each letter ruling

is sent to the district director who has audit jurisdiction of the return of the taxpayer requesting the ruling, in order to assist audit verification of the facts upon which the ruling was based; and that technical advice memoranda are sent to the particular district director requesting the advice (A. 44).

Milton Lichtman, Chief of the Excise Tax Branch, stated that, with three exceptions, the Internal Revenue Service files pertaining to the 23 published revenue rulings sought by respondents contained letter rulings and technical advice memoranda issued with respect to named taxpayers. He further stated that the files also contained applications and correspondence to and from such taxpayers with respect to letter rulings and technical advice (A. 46).

3. The district court rejected the government's claim that the materials were specifically exempt from disclosure by statute under Exemption 3 of the FOI Act. It concluded that Section 6103 of the Internal Revenue Code did not prohibit disclosure of the documents because "[it] provides for the protection of the privacy of persons filing *Income* Tax Returns," whereas the documents here involve the manufacturer's excise tax (Pet. App. A 5A–6A; A. 50; emphasis in original). The district court thereafter denied the Internal Revenue Service's motion for summary judgment and enjoined it from withholding the records demanded by respondents (Pet. App. A 7A–12A; A. 52–57). The court ordered that the Service make available the records and documents "intact and without deletion, except for those items which * * *[it] submits to the

Court * * * sealed and intact, without deletion but with any proposed deletions indicated, for in camera review by the Court * * * as to whether the proposed deletions are justified under the Freedom of Information Act * * *'" (Pet. App. A 8A; A. 53).[3]

The court of appeals affirmed (Pet. App. B 13A–28A; A. 78–90). Although it ruled that the district court erred in construing Section 6103 to bar disclosure of only income tax returns (Pet. App. B 16A; A. 80), it held that letter rulings were not exempt from disclosure because they were not "returns" within the scope of Section 6103. While the court agreed that certain letter rulings might fall within the definition of "return" contained in the Regulations promulgated by the President under Section 6103, it concluded, in conformity with *Tax Analysts & Advocates* v. *Internal Revenue Service,* 505 F. 2d 350 (C.A.D.C.), that those regulations could not "'immunize letter rulings from disclosure under the Freedom of Information Act,' beyond that which Congress intended to protect under § 6103. 505 F. 2d at 354, n. 1." (Pet. App. B 20A; A. 84).

The court of appeals also held that technical advice memoranda were not protected from disclosure under Exemption 3 and Section 6103. In so holding, the court declined to follow the contrary result reached in *Tax*

[3] The district court denied the government's motion for a stay of its order pending appeal (A. 69–71). However, pursuant to the stipulation of the parties, the court of appeals ordered a stay pending its decision (A. 74–77). Pursuant to the order of Mr. Justice Stewart of October 9, 1975, the order of the district court is now stayed until final disposition of the case (A. 101).

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Analysts & Advocates, supra, 505 F. 2d at 355, because it concluded that the district court's disclosure order was more limited with respect to these documents than the order in *Tax Analysts & Advocates.* Finally, the court concluded that the prohibition against disclosure in Section 6103 could be satisfied with respect to both technical advice memoranda and letter rulings through the process of *in camera* review and deletion in the district court (Pet. App. B 20A–22A; A 84–86).

SUMMARY OF ARGUMENT

1. Exemption 3 of the FOI Act (5 U.S.C. 552(b)(3)) provides that the Act does not apply to "matters that are * * * specifically exempted from disclosure by statute." In *Administrator, Federal Aviation Administration* v. *Robertson,* 422 U.S. 255, the Court held that Exemption 3 of the FOI Act was intended to exempt from disclosure material covered by the nearly 100 statutes that restrict public access to government records. As the Court there concluded, the FOI Act cannot be read as repealing these statutes by implication.

Section 6103 of the Internal Revenue Code of 1954, which dates from the very beginning of our modern tax system, is such a statute. Like the statute involved in the *Robertson* case, Congress, in its enactment of the FOI Act, was aware of Section 6103 as announcing a principle of confidentiality with respect to information in the possession of the Internal Revenue Service. The statute provides for nondisclosure of "returns" made with respect to taxes imposed by the

Code, including the manufacturer's excise tax here involved.

Respondents and the court of appeals do not quarrel with the proposition that Section 6103 is a nondisclosure statute of the type covered by Exemption 3. However, respondents contend, and the decision below held, that the specific documents at issue—letter rulings, technical advice memoranda, and related files—are not "returns" within the meaning of Section 6103. But if the principle of confidentiality embodied in Section 6103 is to have any meaning, the term "return" cannot, as respondents would have it, be limited to a prescribed official form. Indeed, the decisions of this Court establish that a "return" is a report with respect to tax liability and not simply an official form.

Given the large variety of documents submitted by taxpayers to the Internal Revenue Service and those prepared by the agency itself in connection with its determinations of tax liability, the nondisclosure principle of Section 6103 could easily be circumvented if it were limited to prescribed forms. Taxpayers frequently submit additional information either voluntarily or at the request of the Service in order to explain data reported on their returns. Similarly, at the conclusion of an audit, a revenue agent will prepare a report which refers to items on a return. Although these documents are not physically part of an official form, they all contain information either already reported on such a form or which is related to information so reported. The congressional policy against the disclosure of Internal Revenue Service

information relating to the liability of a particular taxpayer can be properly effectuated only if the applicability of Section 6103 depends upon the nature of the information sought and not the title of the particular documents on which it is written.

Thus, the Treasury Regulations under Section 6103 broadly define a "return" to include all written statements filed by the taxpayer "which are designed to be supplemental to * * * the return" and "[o]ther records [etc.] relating to [such written statements]." 26 C.F.R. 301.6103(a)-1(a)(3)(i). These Regulations, which are promulgated by the President, encompass the documents at issue. As a reasonable implementation of the statutory policy of confidentiality of tax information, the Regulations should be sustained.

2. The foregoing considerations demonstrate that Section 6103 bars the disclosure of the letter rulings and technical advice memoranda sought by respondents. Letter rulings set forth detailed statements of fact submitted by taxpayers to the National Office of the Internal Revenue Service which are followed by the Service's legal conclusions. Such facts must be set forth in the ruling in order to indicate the basis on which the ruling is issued and to permit corroboration by an auditing agent. Thus, a letter ruling is essentially an advance audit procedure designed to promote public compliance with the tax law and uniformity of treatment.

The fact that the taxpayer submits facts to the Service prior to completion of his return in order to report his tax liability correctly furnishes no basis for

holding them less confidential than if such facts were first discovered upon an audit. It would be perverse to conclude that a taxpayer sacrifices confidentiality when he submits information to the Service in order that his completed return be correct, but that he retained confidentiality when he relies upon his own conclusions, so that only the chances of audit may turn up such information after the completed return is filed.

A technical advice memorandum is comparable to a letter ruling. It is an opinion of the National Office in response to a request from a field office as to the proper treatment of a transaction involved in an audit. Since it arises during audit of a return, it necessarily is entitled to the same confidentiality that Section 6103 provides for the return, if that provision is to have any meaning or purpose.

The court of appeals misunderstood the nature of the technical advice procedure. Contrary to its reasoning, the fact that a copy of the technical memorandum portion of a technical advice memorandum is furnished to the affected taxpayer is no reason why it should be made available to the general public. Indeed, the furnishing to a taxpayer of a copy of his own return is expressly authorized by the Section 6103 Regulations. Thus, the Service's practice of furnishing the affected taxpayer with a copy of the audit determination part of the technical advice memorandum does not breach the nondisclosure rule of Section 6103.

3. In order to fulfill the policy reflected in Exemp-

tion 3 of the FOI Act to continue the effectiveness of all of the statutes by which Congress had protected the confidentiality of various categories of government documents, Congress intended to protect all groups of documents to which the agencies had applied their nondisclosure statutes. Thus, when Congress in Exemption 3 continued the effectiveness of Section 6103, it necessarily intended to include the administrative interpretation of the reach of that section which is reflected by the policy of the Internal Revenue Service. It has been the consistent view and practice of the Executive Branch for more than 50 years, of which Congress has been made aware, that the term "return" in Section 6103 includes documents of the type of which respondents seek disclosure.

Even beyond its awareness of published regulations and rulings, Congress on several occasions has been informed that the Internal Revenue Service regularly withheld from public disclosure such letter rulings and technical advice memoranda. Indeed, during Congress' 1972 reexamination of the FOI Act, the Internal Revenue Service restated its view that Section 6103 of the Code prohibited disclosure of such documents, a conclusion with which the pertinent House subcommittee report agreed. Since the current Regulations were promulgated prior to the 1972 review and the 1974 amendment of the Freedom of Information Act, they not only have the authority ordinarily accorded by this Court to Treasury Regulations, but enjoy the added force of recent congressional consideration and acquiescence. In light of this continuing legislative scrutiny of the problem, Congress must be

deemed to have exercised an informed judgement that the disclosure policy of the FOI Act must yield to the public interest that the confidentiality of data submitted to the Internal Revenue Service must be preserved.

ARGUMENT

THE INTERNAL REVENUE SERVICE LETTER RULINGS, TECHNICAL ADVICE MEMORANDA AND RELATED MATERIALS ARE EXEMPT FROM DISCLOSURE UNDER EXEMPTION 3 OF THE FREEDOM OF INFORMATION ACT BECAUSE THEY ARE MATTERS THAT ARE "SPECIFICALLY EXEMPTED FROM DISCLOSURE BY STATUTE"

A. INTRODUCTION

In *Administrator, Federal Aviation Administration* v. *Robertson*, 422 U.S. 255, this Court held that Exemption 3 of the FOI Act, which covers "matters that are * * * specifically exempted from disclosure by statute," was intended to exempt from disclosure material covered by the nearly 100 statutes that restrict public access to government records. After observing that "[n]othing in the [FOI] Act or its legislative history gives any intimation that all information in all agencies and in all circumstances is to be open to public inspection" (422 U.S. at 262), the Court concluded that Exemption 3 covers all statutes that require or permit nondisclosure of government information. As the Court stated, the FOI Act cannot be read as repealing by implication the various statutes providing for nondisclosure (*id.* at 265–266). Simply put, "Congress' response was to permit the numerous laws then extant allowing confidentiality to stand; it

is not for us to override that legislative choice" (*id.* at 266).

Thus, in considering a claim that material is covered by Exemption 3 as "matters that are * * * specifically exempted from disclosure by statute," the only question "to be determined in a district court's *de novo* inquiry is the factual existence of such a statute, regardless of how unwise, self-protective, or inadvertent the enactment might be." *Environmental Protection Agency* v. *Mink,* 410 U.S. 73, 95 n.* (Stewart, J., concurring). See also *Administrator, Federal Aviation Administration* v. *Robertson, supra,* 422 U.S. at 270 (Stewart, J., concurring).

Section 6103 of the Internal Revenue Code is such a statute although, as we shall demonstrate, it is neither unwise nor self-protective, nor was its enactment inadvertent. From the very beginning of our modern tax system, the statute has embodied a principle of confidentiality of information in the possession of the Internal Revenue Service by virtue of its function as national tax collector. It is therefore not surprising that respondents have conceded (Br. in Opp. 9) that Section 6103, of which Congress was aware in enacting the FOI Act, is a statute that "specifically exempt[s]" from disclosure the matters it covers.

While the court of appeals recognized that Section 6103 is a nondisclosure statute which Exemption 3 covers, it erroneously limited its coverage to the printed and prescribed tax return forms filed by taxpayers. We submit that this restrictive gloss upon Section 6103 cannot be squared with the language and history of that statute and its implementing Regulations. They uniformly demonstrate that Congress intended to prohibit the disclosure of the letter rulings, technical advice memoranda, and related files at issue here. Exemption 3 of the FOI Act therefore covers these documents.

B. SECTION 6103 OF THE INTERNAL REVENUE CODE BARS THE DISCLOSURE OF INTERNAL REVENUE SERVICE LETTER RULINGS, TECHNICAL ADVICE MEMORANDA, AND RELATED FILES

1. Section 6103(a) of the Internal Revenue Code of 1954, Appendix, *infra,* pp. 41–42, with exceptions not here relevant,[4] provides for the confidentiality of tax[5] returns by providing that they shall be "open to public examination and inspection to such extent as shall be authorized in rules and regulations promulgated by the President." See Section 6103(a)(2). The Regulations (Section 301.6103(a)–1(d), (e), (f), and (g)) permit disclosure of tax returns to state and federal officers whose official duties require such inspection.

In Secton 301.6103(a)–1(a)(3)(i) of those Regulations (26 C.F.R.), the term "return" is broadly defined to include—

> (*a*) Information returns, schedules, lists, and other written statements filed by or on behalf of the taxpayer with the Internal Revenue Service which are designed to be supplemental to or become a part of the return, and

[4] See Section 6103(b),(c), and (d), respectively, providing for inspection of returns by state officials, shareholders, and committees of Congress.

[5] The court of appeals held that the district court erred in construing Section 6103 to bar disclosure of only income tax returns (Pet. App. B 16A; A. 80). Section 6103(a)(2) explicitly covers returns for taxes imposed under Chapter 32 of the Code, which includes Section 4061, imposing the manufacturer's excise tax here involved.

> (*b*) Other records, reports, information received orally or in writing, factual data, documents, papers, abstracts, memoranda, or evidence taken, or any portion thereof, relating to the items included under (*a*) of this subdivision. * * *

As we shall demonstrate, *infra*, the documents requested by respondents fit within this regulatory definition.

Insofar as it relates to income taxes, the confidentiality requirement with respect to tax returns have their earliest roots in Section 11 of the Act of July 14, 1870, c. 255, 16 Stat. 256, 259, which prohibited the publication of income tax returns. A similar nondisclosure rule was provided by Section 38 of the Act of August 5, 1909, c. 6, 36 Stat. 11, 116, which imposed an excise tax on corporations, measured by net income, as amended by the Act of June 17, 1910, c. 297, 36 Stat. 468, 494.[6] After Congress had imposed various manufacturer's excise taxes in Sections 601–629 of the Revenue Act of 1932, c. 209, 47 Stat. 169, 259–270, it amended Section 55 of the Revenue Act of 1932 to extend to all returns the nondisclosure provisions that it had previously applied to income tax returns. See Section 218(h) of the National Industrial Recovery Act, c. 90, 48 Stat. 195, 209. The provisions barring disclosure of manufacturer's excise tax returns were carried forward in Section 55 of the Internal Revenue

[6] The somewhat unusual phrasing of the statute may be explained by the fact that Section 38 of the 1909 Act contained the following provisions (36 Stat. 116–117).

"Sixth. When the assessment shall be made, as provided in this section, the returns, together with any corrections thereof which

Code of 1939 (26 U.S.C. (1952 ed.)) and are now set forth in Section 6103(a)(2) of the current Code.

Thus, Section 6103 has long imposed upon the Internal Revenue Service in comprehensive terms the obligation of confidentiality with respect to tax re-

may have been made by the commissioner, shall be filed in the office of the Commissioner of Internal Revenue and shall constitute public records and be open to inspection as such.

"Seventh. It shall be unlawful for any collector, deputy collector, agent, clerk, or other officer or employee of the United States to divulge or make known in any manner whatever not provided by law to any person any information obtained by him in the discharge of his official duty, or to divulge or make known in any manner not provided by law any document received, evidence taken, or report made under this section except upon the special direction of the President; and any offense against the foregoing provision shall be a misdemeanor and be punished by a fine not exceeding one thousand dollars, or by imprisonment not exceeding one year, or both, at the discretion of the court."

The seeming contradiction between these provisions was eliminated by the Act of June 17, 1910, *supra*. The Act foreclosed the implementation of the broad public disclosure provision in Section 38, Sixth of the 1909 Act, by providing in much the same fashion as Section 6103 of the current Code that "any and all such returns shall be open to inspection only upon the order of the President under rules and regulations to be prescribed by the Secretary of the Treasury and approved by the President." See 45 Cong. Rec. 4131, 4137–4138 (1910). Section II(G)(d) of the Income Tax Act of 1913, c. 16, 38 Stat. 114, 177, consolidated the provisions and they were carried forward in successive Revenue Acts.

For a description of this statutory history, see *United States* v. *Dickey*, 268 U.S. 378, 387. Subsequent to the Income Tax Act of 1913, there were two short-lived experiments with limited disclosure of tax return information. See Section 257(b) of the Revenue Act of 1924, c. 234, 43 Stat. 253, 293, which was deleted by the Revenue Act of 1926. See H.R. Rep. No. 1, 69th Cong., 1st Sess. pp. 9–10 (1926). A second limited disclosure provision, Section 55(b) of the Revenue Act of 1934, c. 277, 48 Stat. 680, 698, was repealed in 1935 before it became effective. See Act of April 19, 1935, c. 74, 49 Stat. 158; H.R. Rep. No. 313, 74th Cong., 1st Sess., pp. 1–2 (1935).

turns. This nondisclosure rule is similar to that generally provided by 18 U.S.C. 1905, Appendix, *infra*, p. 41, which forbids government employees, under pain of criminal sanction, to disclose financial or commercial information received in the course of employment. Likewise, Section 7213 of the Internal Revenue Code, Appendix, *infra*, pp. 42–45, makes it a misdemeanor for various specified persons to divulge data set forth in an income tax return.[7]

The necessity for such nondisclosure of tax information hardly requires elaboration. Our self-reporting tax system depends in large measure upon the willingness of each taxpayer to submit voluntarily all information relevant to his tax liability, with the good faith expectation that the Internal Revenue Service will not disclose it to third parties. As this Court observed

[7] The first criminal sanction against the disclosure of tax information by officers or employees of the government, similar to Section 7213(b) of the 1954 Code, was imposed by Section 38 of the Act of June 30, 1864, c. 173, 13 Stat. 223, 238, which was subsequently codified as R.S. 3167. Section 19 of the same statute provided that the "annual lists" required to be filed should be open to public inspection. This latter provision, however, was repealed by Section 11 of the Act of July 14, 1870, c. 255, 16 Stat. 256, 259, which prohibited the publication in any manner of "such income returns, or any part thereof." When the Act of August 27, 1894, c. 349, 28 Stat. 509, reimposed an income tax, Section 34 amended R.S. 3167 by adding provisions prohibiting disclosure of income tax information in terms similar to Section 7213(a) of the 1954 Code. Later revenue acts, prior to the adoption of the non-disclosure sanction of the 1939 Code, re-enacted R.S. 3167 without change. See, *e.g.*, Revenue Act of 1926, c. 27, Section 1115, 44 Stat. 9, 117. Prohibition of disclosure of income tax information by officers or employees of the government is continued by Section 7213 (a) of the Internal Revenue Code of 1954. The criminal sanction against disclosure of information contained in returns other than income tax returns is contained in 18 U.S.C. 1905.

more than 75 years ago in *Boske* v. *Comingore*, 177 U.S. 459, 469–470, in upholding the validity of Regulations prohibiting disclosure of Treasury tax records which were sought by state revenue officers: "The interests of persons compelled, under the revenue laws, to furnish information as to their private business affairs would often be seriously affected if the disclosures so made were not properly guarded."

In light of this longstanding policy against the disclosure of information furnished by taxpayers to the Treasury, it is not surprising that Section 6103 of the Internal Revenue Code was one of the nearly 100 statutes of which Congress was aware in its formulation of Exemption 3. See H.R. Rep. No. 1497, 89th Cong., 2d Sess., p. 10 (1966); House Committee Print, Federal Statutes on the Availability of Information, 86th Cong., 2d Sess., pp. 213–214 (1960); Hearings on S. 1666 and 1663 (in part) before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 88th Cong., 1st Sess., pp. 179–187 (1963).[8] It is therefore clear that in the FOI Act Congress intended to preserve the protective scope of Section 6103.

[8] Section 6103 was also listed in an exhibit (pp. 986, 1006) submitted during the Hearings on S. 921 (Freedom of Information and Secrecy in Government) before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary conducted in 1958, 85th Cong., 2d Sess., as one of the "Statutory Provisions Restricting Disclosure of Government Information." See *Administrator, Federal Aviation Administration* v. *Robertson*, *supra*, 422 U.S. at 264–265 n. 11, where the Court relied upon that earlier exhibit as evidence of congressional awareness of various nondisclosure statutes. The predecessor to nondisclosure statute involved in that case, Section 1104 of the Federal Aviation Act, was listed in that 1958 exhibit.

2. Section 6103 prohibits the disclosure of the documents sought by respondents. By its terms, it bars the public inspection and examination of "returns made with respect to taxes * * *." Although colloquial usage has identified the term "return" with the printed and prescribed form on which the great majority of tax returns are made, a return is, more accurately, simply a report, whether it be the return of an officer who has served process, an election return,[9] or the return of a taxpayer. As this Court pointed out in *Florsheim Bros. Co.* v. *United States*, 280 U.S. 453, 457, n. 3:

> Statutes imposing direct taxes have always required taxpayers to file "lists" or "schedules" or "statements" or "returns" specifying in detail the information requisite for an assessment of the tax. The word "return" has not always been used. Sometimes it has been used as a synonym for "list," "schedule" or "statement." The specification in the statutes of the prescribed contents of such lists or returns has varied in its detail. But always definite statements of facts were required, from which the tax could be computed.[10]

[9] See Article I, Section 5 of the Constitution, which provides that "[e]ach House shall be the Judge of the Elections, *Returns* and Qualifications of its own Members * * *" (emphasis supplied).

[10] See Act of July 9, 1798, c. 70, Section 9, 1 Stat. 580, 585–586; Act of July 1, 1862, c. 119, Sections 6, 93, 12 Stat. 432, 434, 475; Act of June 30, 1864, c. 173, Sections 11, 82, 98, 102, 109, 13 Stat. 223, 225, 258, 273, 275, 277; Act of August 5, 1909, c. 6, Section 38, 36 Stat. 11, 114; R.S. 3173. This usage is continued in the 1954 Code, where Section 6011 requires that any person liable for any tax, or for the collection thereof, "shall make a return or statement according to the forms and regulations prescribed * * *."

On other occasions, the Court has employed the term "return" to connote the transmittal of information by the taxpayer. See, *e.g.*, *United States* v. *Carroll*, 345 U.S. 457; *Automobile Club of Michigan* v. *Commissioner*, 353 U.S. 180, 186–188. Thus, a tax return is not simply the piece of paper bearing a particular printed official form as its identifying label, but is a report of information relevant to tax liability.[11]

This principle emphasizing the substance of the information rather than its form is incorporated in the Treasury Regulations under Section 6103, which the President promulgated.[12] Under Section 301.6103(a)–1(a)(3)(i) of those Regulations, the term "return" is defined to include all written statements "filed by or on behalf of the taxpayer with the Internal Revenue Service which are designed to be supplemental to or become a part of the return" and other written or oral information "relating to" such statements. By defining "return" to include all documents containing information reported in or related to a return, the Regulations insure that the statutory policy of confidentiality will not be defeated by confining the term "tax return" to the prescribed official printed form.

[11] For example, a taxpayer cannot avoid the criminal sanctions under Section 7203 of the Code for willful failure to file a return by filing the prescribed form, duly executed, but devoid of the required information relating to his tax liability. See, *e.g.*, *United States* v. *Porth*, 426 F. 2d 519 (C.A. 10), certiorari denied, 400 U.S. 824; *United States* v. *Klee*, 494 F. 2d 394 (C.A. 9), certiorari denied, 419 U.S. 835; *United States* v. *Jordan*, 508 F. 2d 750 (C.A. 7), certiorari denied, October 6, 1975, No. 74–6323.

[12] Executive Order 11650, 37 Fed. Reg. 3739 (1972-1 Cum. Bull. 381).

The Regulation therefore reasonably implements and effectuates the congressional purpose. See, *e.g.*, *Commissioner* v. *South Texas Lumber Co.*, 333 U.S. 496, 501.

The regulatory definition of "return" recognizes that the Internal Revenue Service has in its possession much information relating to the liabilities of taxpayers which is not set forth in prescribed official forms. Taxpayers frequently submit additional information either voluntarily or at the request of the Service in order to explain data reported on their returns. Similarly, at the conclusion of an audit, a revenue agent will prepare a report which refers to items on a return. The taxpayer may in turn file a protest to the agent's conclusions. Although these documents are not physically part of the prescribed official tax return form, they contain information either already reported in a return or related to items reported in a return.

The provision for confidentiality embodied in Section 6103 would have little meaning if it did not encompass these other documents relating to the tax liability of the taxpayer. The congressional policy against disclosure of Internal Revenue Service information relating to the liability of a particular taxpayer can be properly effectuated only if the applicability of Section 6103 depends upon the nature of the information sought and not the title of the particular documents on which it is written. See *Boske* v. *Comingore, supra,* 177 U.S. at 469–470; *St. Regis Paper Co.* v. *United States,* 368 U.S. 208,

217–219; *Heathman* v. *United States District Court,* 503 F. 2d 1032, 1035–1037 (C.A. 9) (Chambers, J., concurring and dissenting); *Association of American Railroads* v. *United States,* 371 F. Supp. 114, 116–118 (D.D.C.) (three-judge court). Simply put, the private character of the information in a tax return is not altered for purposes of Section 6103 because it is also recorded on other documents as part of the process of determining tax liability.

3. In holding that letter rulings and technical advice memoranda were not covered by Exemption 3 of the FOI Act, the court of appeals ignored the broad statutory nondisclosure policy expressed in the Regulations under Section 6103 promulgated by the President. Although letter rulings and technical advice memoranda share common attributes, the error of the court below is best demonstrated by separate analysis of each aspect of its decision. We now turn to a detailed discussion of the nature of the documents sought by respondents, each of which contains information either already reported on a return or related to items reported on a return.

1. LETTER RULINGS

Letter rulings are written statements issued by the National Office of the Internal Revenue Service in response to a taxpayer's request for the Service to apply the tax law to a given set of facts. They are given with respect to both completed and prospective transactions. When the transaction is subsequently reported in a tax return, the auditing agent simply compares the information on the return with the facts in

the ruling. If there is no variance, the conclusion of the ruling will determine the tax treatment of the transaction.

The rulings program is of great assistance not only to the taxpaying public but also to the Internal Revenue Service in its administration of the tax laws. Each year, in response to formally submitted requests, the Internal Revenue Service issues approximately 40,000 letter rulings setting forth its opinion concerning the federal tax consequences of specific transactions which are either proposed or already executed. These rulings simplify the conduct of audits by identifying the facts which the agent must confirm. Moreover, since the rulings are issued by the National Office, the ruling program assures a degree of uniformity of treatment that could not be obtained if revenue agents throughout the country were to apply their unaided individual conclusions.[13]

A ruling is initiated by a taxpayer's written request. The request is required to set forth a complete statements of facts relating to the transaction. See Statement of Procedural Rules, Section 601.201(e)(2) (26 C.F.R.).[14] The letter ruling in reply consists of

[13] The ruling program has been described and appraised by a former Chief Counsel of the Internal Revenue Service and a former Commissioner. See Rogovin, *The Four R's: Regulations, Rulings, Reliance and Retroactivity*, 43 Taxes 756 (1965); Caplin, *Taxpayer Rulings Policy of the Internal Revenue Service*, 20 N.Y.U. Institute on Federal Taxation 1 (1962).

[14] For an example of the detail required in a request for a ruling: *A Statement of Principles*, see Rev. Proc. 75–32, 1975–27 Int. Rev. Bull. 43, which prescribes the information required for a ruling under Section 337 of the Code.

a detailed recital of the relevant facts submitted by the taxpayer followed by the Service's conclusions. It is this recital of facts, both in the taxpayer's submission and in the Service's reply, that requires confidentiality with respect to these documents.

It is essential that the letter rulings set forth the facts submitted by the taxpayer, so that an auditing agent can corroborate the facts on which the ruling is based. Those facts, which constitute the same type of information contained in a tax return, require confidentiality just as much when submitted in a ruling request or contained in the ruling itself.

In concluding that the excise tax letter rulings were not covered by Exemption 3, the decision below followed a similar holding with respect to income tax letter rulings in *Tax Analysts & Advocates* v. *Internal Revenue Service, supra,* 505 F. 2d at 351–355. In that case, the court concluded that "letter rulings generated by the voluntary request of a taxpayer for tax advice from the IRS are beyond the scope of that which the Congress sought to protect under section 6103, that is, 'returns' filed under compulsion of law which contain information necessary to determine federal tax liability" (*id.* at 354 n. 1).

The court's distinction between voluntary and mandatory ruling requests for purposes of the disclosure issue involved in this case is unsound. Not all ruling requests are voluntary. There are several instances in which the Internal Revenue Code requires the issuance of a letter ruling as a condition of a particular tax result. For example, a ruling is required in connection with certain transactions involving foreign

corporations (Section 367), the transfer of appreciated securities to certain foreign entities (Section 1492), and the change of an accounting period (Section 442).[15] However, in many other cases, ruling requests may be voluntary but are submitted as a matter of practical necessity. Thus, for example, favorable treatment under Section 306(b)(4) of the Code turns on whether the Commissioner is satisfied that tax avoidance is not a principal purpose of the transaction. Similarly, if a transaction is of sufficient magnitude, minimal prudence will require the parties to seek the predictability of result that accompanies the issuance of a ruling.

But whether a ruling request is voluntary or mandatory under the Code, the significant fact for purposes of the nondisclosure policy of Section 6103 is that it contains information of the same character as that set forth in the taxpayer's completed return. A letter ruling sets forth a detailed statement of facts in the context of what is essentially an advance audit. Such a document necessarily includes confidential information relating to the taxpayer's profits, expenses, the nature of his business, and the like.

If a taxpayer submits to the Internal Revenue Service facts relevant to his tax liability before the final date for his return rather than on that date, or after, there is no reason why he should be deemed to have waived confidentiality. He has not explicitly done so, and he has no lesser interest in confidentiality (or the

[15] Other Code provisions requiring the issuance of a ruling as a condition to a particular tax consequence include Sections 446(e), 507(b), 514(b)(3)(A), 706(b), 4942(g)(2), and 4945(g).

public any greater interest in disclosure) with respect to facts communicated to the Service prior to the completion of the return than with respect to facts disclosed in the return or discovered by the Service thereafter. If the taxpayer submits information in advance of his return, which is of the same character as that submitted on his return, that submission falls within the broad definition of "return" under the Section 6103 Regulations. Accordingly, it is protected from disclosure under Section 6103.

Indeed, the court in *Tax Analysts* acknowledged (505 F. 2d at 354 n. 1) that a ruling involving a subsequently executed transaction required to be reported on a return would "relate" to a return within the meaning of the Presidential Regulations under Section 6103. But even with respect to a transaction that may not be executed, the requirement that the ruling recite the relevant facts makes it almost inevitable that such facts have been or will be reported in the taxpayer's return so as to "relate" to a return and warrant the application of the statutory nondisclosure rule. The privacy interest of the taxpayer in such information is precisely the same whether or not the contemplated transaction is executed.

Moreover, the free assistance furnished by the Internal Revenue Service to thousands of individual taxpayers who come to the offices of District Directors seeking assistance with the preparation of returns is essentially equivalent to letter rulings. Those taxpayers have no reason to anticipate that the information they give to the personnel assisting them in advance

of the completion and filing of the executed form [16] will be treated any less confidentially than information supplied on a subsequent audit." [17] Since these informal communications of information with respect to tax liability are entitled to confidentiality, the more formal communications of information embodied in requests for rulings, and the Service's replies, should equally be protected from disclosure under Section 6103 and the Regulations.

Finally, in this case, where respondents seek taxpayer submissions to the Internal Revenue Service and letter rulings involving manufacturer's excise taxes, there is a special reason why such documents should be immune from disclosure. Section 4216(b)(1) of the Code provides that the manufacturer's excise tax shall be computed upon a constructive sales price if the manufacturer sells at retail, on consignment, or at less than the fair market price unless through an arm's length transaction. If a sale is at retail, the tax is computed "on whichever of the following prices is the lower: (i) the price for which such article is sold, or (ii) the highest price for which such articles are sold to wholesale distributors, in the ordinary course of trade, by manufacturers or producers thereof, as *determined by the Secretary or his delegate*" (em-

[16] The Regulations cover this situation by providing that "information received orally or in writing" is included in the term "return." See Treasury Regulations, Section 301.6103(a)-1(a)(3)(i)(*b*).

[17] Compare Section 7216 of the Code (26 U.S.C. (Supp. IV)), which imposes the obligation of confidentiality upon commercial preparers of returns.

phasis added). T.D. 6355, 1959-1 Cum. Bull. 795, sets forth the rules, and the detailed information required, for obtaining such a constructive price determination by the Commissioner.

Since the taxpayer can obtain a determination of the amount on which his tax is to be computed only by supplying information to the Commissioner that does not appear upon the Manufacturer's Excise Tax Form 720 (see Respondents' Brief in Opposition, Appendix G 37), respondents' claim that the protections of Section 6103 are limited to the Form 720 would subject to disclosure confidential financial data which is essential to a determination of excise tax liability. The mere fact that such information submitted to the Service is not required to be set forth on the Form 720 should not subject it to public disclosure.

Finally, respondents' request for the Internal Revenue Service files with respect to a number of published Revenue Rulings suffers from the same defect as their request for letter rulings and technical advice memoranda. These files include correspondence, analysis, and submissions of fact with respect to determinations of constructive sales prices. Some of them (*e.g.*, Rev. Rul. 68-202, 1968-1 Cum. Bull. 477; Rev. Rul. 68-519, 1968-2 Cum. Bull. 513) involve constructive price determinations made under Section 4216(b)(1). While the very nature of such determinations would indicate that the underlying files would contain specific detailed financial data related to the determination of tax liability of particular taxpayers, we need not speculate whether this is the case. As the

affidavit of one of the Internal Revenue Service officials stated, with three exceptions, those files contain letter rulings or technical advice memoranda issued with respect to named taxpayers together with underlying correspondence (A. 46). Hence, if Exemption 3 bars disclosure of letter rulings and technical advice memoranda, it would similarly bar disclosure of the files containing such documents.[18]

Indeed, disclosure of such pricing determinations with respect to manufactured items would also appear to implicate 18 U.S.C. 1905. That statute prohibits an employee of the United States from disclosing information which "concerns or relates to * * * processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses or expenditures of any person, firm, partnership, corporation, or association * * *." However, for present purposes, it is sufficient that such materials are barred from disclosure as returns within the meaning of Section 6103 and the pertinent Regulations.

2. TECHNICAL ADVICE MEMORANDA

Technical advice memoranda are issued to a district director in response to his request for instructions from the National Office as to the correct tax treat-

[18] Section 6103 is similarly applicable to bar disclosure of the Internal Revenue Service's letter rulings indexing system sought by respondents. If that statute prohibits disclosure of letter rulings, it would appear to make confidential any material which would list the names of recipients of such rulings and synopses of their pertinent facts (see A. 12–13, 31, 43–44).

ment of a specific set of facts relating to a named taxpayer. Such requests arise either in connection with the audit of a return or consideration of a claim for refund. The reply from the National Office consists of two parts: (1) a transmittal memorandum containing information for the district director which cannot be disclosed to the taxpayers; and (2) a "technical advice memorandum," containing a detailed statement of facts followed by a discussion of those facts in light of the applicable law. A copy of the technical advice memorandum is generally furnished to the taxpayer. See Statement of Procedural Rules, Section 601.105(b)(5)(vi) (26 C.F.R.).

These two-part technical advice memoranda are prepared by the Internal Revenue Service in the context of the factual situation of a specific tax return or claim for refund and they necessarily contain information set forth in that return or claim. The response serves principally to instruct the district office on how to dispose of the case. See Statement of Procedural Rules, Section 601.105(b)(5) (i), (vi), and (viii) (26 C.F.R.). Since the Service prepares these memoranda as part of the process of audit of a specific tax return or the consideration of a claim for refund, they necessarily contain and concern the information set forth in the return and claim. They are "reports * * * relating to * * * ['* * * returns * * * filed by * * * the taxpayer * * *']" within the meaning of the Regulation. The fact that such information is also set forth in a separate document known as a technical advice memorandum does not justify its public dis-

closure any more than a revenue agent's report of his audit of a taxpayer could be disclosed to a person other than the taxpayer or his authorized representative. As the District of Columbia Circuit ruled in *Tax Analysts & Advocates* v. *Internal Revenue Service, supra,* 505 F. 2d at 355, "Technical advice memoranda deal directly with information contained in 'returns made with respect to taxes' and are a part of the process by which tax determinations are made and, thus, 'specifically exempted from disclosure by statute.'"

The court below attempted to distinguish *Tax Analysts* on the ground that "the [district court's] order here most carefully limits disclosure to 'those portions of responses to Technical Advice requests that are or were intended for issuance to taxpayers'" (Pet. App. B 21A; A. 84). But the court's distinction suffers from two critical infirmities.

First, the injunctive orders in both cases are identical in requiring only the disclosure of the second part of the technical advice memorandum, *viz.,* the part of the memorandum constituting the Service's audit determination. See *Tax Analysts & Advocates* v. *Internal Revenue Service,* 362 F. Supp. 1298, 1310 (D.D.C.). Second, the court's statement that such documents are "intended for issuance to taxpayers" misapprehends the nature of the technical advice procedure.

Because the content of the technical advice memorandum is so closely related to the previously filed return, it is the practice of the Service to furnish the

affected taxpayer with a copy of its memorandum covering the audit determination (see Statement of Procedural Rules, Section 601.105(b)(5)(vi)(*e*)). However, this practice cannot justify the third-party disclosure approved by the court of appeals. The taxpayer is necessarily privy to the information reported in his own tax return; that knowledge, however, is a far cry from making that information available to the general public. It would indeed be a travesty upon the confidentiality principle of Section 6103 to reason that since a taxpayer may be made aware of Service conclusions with respect to his own return, the information giving rise to those conclusions, or the conclusions themselves, should be made public under the FOI Act.

Finally, the furnishing of a copy of the return of a taxpayer to the taxpayer himself is expressly authorized by Section 301.6103(a)-1(c)(1)(ii) of the Presidential Regulations. Thus, the Service's practice of furnishing the affected taxpayer with a copy of the audit determination of the technical advice memorandum does not breach the nondisclosure rule of Section 6103.

In summary, both the letter rulings and technical advice memoranda sought by respondents meet the broad definition of "return" under the Section 6103 Regulations. Just as a technical advice memorandum incorporates information from a tax return in the context of a present audit, a letter ruling sets forth facts in the context of an advance audit. The substance of both documents is confidential information submitted

to the Internal Revenue Service by the taxpayer in connection with its determination of his tax liability. By virtue of Section 6103, Exemption 3 therefore bars the disclosure of these documents.

4. Apart from the terms of Section 6103 and its Regulations, there are other indications that Exemption 3 is applicable to the documents sought in this suit. In order to effectuate the policy reflected in Exemption 3 of the FOI Act to continue the effectiveness of all of the statutes by which Congress had protected the confidentiality of various categories of government documents, Congress intended to protect all groups of documents to which the agencies had applied their nondisclosure statutes. Thus, when Congress in Exemption 3 continued the effectiveness of Section 6103 of the Code, it necessarily intended to include the administrative interpretations of the reach of that section. Those interpretations, like the determination of the Federal Aviation Administration in *Robertson* that the particular reports there involved should be kept confidential, are representative of the type of agency practice formulated in the light of experience that Congress intended to adopt and preserve when it provided for confidential treatment of material "specifically exempted from disclosure by statute."

It has been the consistent view and practice of the Executive Branch for more than 50 years, of which Congress has been made aware, that the term "return" in Section 6103 includes documents of the type of

which respondents seek disclosure.[19] Congress intended Exemption 3 to cover those documents.

Even beyond its awareness of published regulations and rulings, Congress on several occasions has been informed that the Internal Revenue Service regularly withheld from public disclosure documents of the type respondents seek. See Monograph of the Attorney General's Committee on Administrative Procedure, Administrative Procedure in Government Agencies, S. Doc. No. 10, 77th Cong., 1st Sess., Part 9, pp. 32, n.

[19] Regulations promulgated in 1920 provided that written statements filed with the Commissioner designed to be supplemental to and become part of a return were to be treated as returns. T.D. 2961, 2 Cum. Bull. 250. In 1938, the Regulations were expanded to provide the Commissioner with discretion to treat "other records and reports which contain information included or required by statute to be included in the return" as returns in cases where returns were open to inspection. T.D. 4873, 1938–2 Cum. Bull. 261, 268. In 1961, the Commissioner was given discretion to define such materials as returns, whether or not the filed return was open to inspection. T.D. 6543, 1961–1 Cum. Bull. 671, 673. The more detailed definition in the current Regulations was promulgated in 1972 to reflect existing practice and to remove from the Commissioner the discretion to determine which materials should be treated as returns. T.D. 7162, 1972–1 Cum. Bull. 381.

Moreover, the Commissioner has interpreted the term "return" with the same functional breadth in published rulings. See O. 879, 1 Cum. Bull. 262 (1919) (ownership certificates deemed returns); I.T. 1902, III–1 Cum. Bull. 196 (1924) (oil depletion allowance data sheets deemed returns); I.T. 2645, XI–2 Cum. Bull. 102 (1932) (claim for refund deemed return); I.T. 3826, 1946–2 Cum. Bull. 53 (employee's form W–2 deemed return). See also Rev. Rul. 229, 1953–2 Cum. Bull. 152, 154, and Rev. Proc. 62–9, 1962–1 Cum. Bull. 432, 436, which contain the Service's instructions to district offices regarding which documents were to be made available in addition to filed forms where returns were open to inspection.

126, 66–69 (1941); Hearings on S. 1666 and 1663 (in part) before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 88th Cong., 1st Sess., pp. 179–187 (1963). Finally, during the 1972 hearings conducted by a House Subcommittee on the Administration of the Freedom of Information Act, the Internal Revenue Service restated its view that Sections 6103 and 7213 of the Internal Revenue Code and 18 U.S.C. 1905 prohibited disclosure of letter rulings and technical advice memoranda.[20] Not only did this declaration go unchallenged, but in reporting its findings to the full House later in 1972, the subcommittee stated with reference to the Internal Revenue Service that "It should be noted that much tax data is exempt from disclosure by law." H.R. Rep. No. 92–1419, 92d Cong., 2d Sess., p. 34 (1972).

Indeed, the current Regulations under Section 6103, which broadly define "return" in a manner consistent with the confidentiality principle embodied in the statute, were adopted prior to the Internal Revenue Service's submission to the House subcommittee and the publication of the subcommittee report. Under these circumstances, the Court's observation in *Administrator, Federal Aviation Administration* v. *Robertson, supra*, 422 U.S. at 267, is particularly relevant here—

[20] See Hearings on U.S. Government Information Policies and Practices—Administration and Operation of the Freedom of Information Act, before a Subcommittee of the House Committee on Government Operations, 92d Cong., 2d Sess., Part 6, pp. 2044, 2046 (1972).

> It is not insignificant that * * * [the] overall scrutiny of the [FOI] Act in 1972 brought no change in Exemption 3. Indeed, when Congress amended the Freedom of Information Act in 1974, it reaffirmed the continued vitality of this particular exemption, covering statutes vesting in the agencies wide authority.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be reversed and the case remanded to the district court with directions to dismiss the complaint.

Respectfully submitted.

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APPENDIX

5 U.S.C. (1970 ED. AND SUPP. IV) 552 [AS AMENDED BY SECTIONS 1(b)(1) AND 2(c), PUB. L. 93-502, 93D CONG., 2D SESS., 88 STAT. 1561, 1564]. PUBLIC INFORMATION; AGENCY RULES, OPINIONS, ORDERS, RECORDS, AND PROCEEDINGS

(a) Each agency shall make available to the public information as follows:

* * * * *

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases; (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; * * *

* * * * *

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

* * * * *

(b) This section does not apply to matters that are—

* * * * *

(3) specifically exempted from disclosure by statute;

* * * * *

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

* * * * *

18 U.S.C.:

§ 1905. Disclosure of confidential information generally

Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment.

INTERNAL REVENUE CODE OF 1954, AS AMENDED (26 U.S.C.):

SEC. 6103. PUBLICITY OF RETURNS AND DISCLOSURE OF INFORMATION AS TO PERSONS FILING INCOME TAX RETURNS.

(a) *Public record and inspection—*

(1) Returns made with respect to taxes imposed by chapters 1, 2, 3, and 6 upon which the tax has been determined by the Secretary or his delegate shall constitute public records; but, except as hereinafter provided in this section, they shall be open to inspection only upon order of the President and under rules and regulations prescribed by the Secretary or his delegate and approved by the President.

(2) All returns made with respect to the taxes imposed by chapters 1, 2, 3, 5, 6, 11, 12, and 32, subchapters B and C of chapter 33, subchapter B of chapter 37, and chapter 41, shall constitute public records and shall be open to public examination and inspection to such extent as shall be authorized in rules and regulations promulgated by the President.

(3) Whenever a return is open to the inspection of any person, a certified copy thereof shall, upon request, be furnished to such person under rules and regulations prescribed by the Secretary or his delegate. The Secretary or his delegate may prescribe a reasonable fee for furnishing such copy.

* * * * *

SEC. 7213. UNAUTHORIZED DISCLOSURE OF INFORMATION.

(a) *Income Returns.—*

(1) *Federal employees and other persons.—*

It shall be unlawful for any officer or employee of the United States to divulge or to make known in any manner whatever not provided by law to any person the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any income return, or to permit any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; and it shall be unlawful for any person to print or publish in any manner whatever not provided by law any income return, or any part thereof or source of income, profits, losses, or expenditures appearing in any income return; and any person committing an offense against the foregoing provisions shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution; and if the offender be an officer or employee of the United States he shall be dismissed from office or discharged from employment.

(2) *State employees.*—Any officer, employee, or agent of any State or political subdivision, who divulges (except as authorized in section 6103(b), or when called upon to testify in any judicial or administrative proceeding to which the State or political subdivision, or such State or local official, body, or commission, as such, is a party), or who makes known to any person in any manner whatever not provided by law, any information acquired by him through an inspection permitted him or another under section 6103(b), or who permits any income return or copy thereof or any book containing any abstract or particulars thereof, or any other information, acquired by him through an inspection permitted him or another under section 6103(b), to be seen or examined by any person except as provided by law, shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

(3) *Shareholders.*—Any shareholder who pursuant to the provisions of section 6103(c) is allowed to examine the return of any corporation, and who makes known in any manner whatever not provided by law the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any such return, shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

(b) *Disclosure of Operations of Manufacturer or Producer.*—Any officer or employee of the United States who divulges or makes known in any manner whatever not provided by law to any person the operations, style of work, or apparatus of any manufacturer or producer visited by him in the discharge of his official duties shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution; and the offender shall be dis-

missed from office or discharged from employment.

(c) *Offenses Relating to Reproduction of Documents.*—Any person who uses any film or photoimpression, or reproduction therefrom, or who discloses any information contained in any such film, photoimpression, or reproduction, in violation of any provision of the regulations prescribed pursuant to section 7513(b), shall be fined not more than $1,000, or imprisoned not more than 1 year, or both.

(d) *Disclosure by Certain Delegates of Secretary.*—All provisions of law relating to the disclosure of information, and all provisions of law relating to penalties for unauthorized disclosure of information, which are applicable in respect of any function under this title when performed by an officer or employee of the Treasury Department are likewise applicable in respect of such function when performed by any person who is a "delegate" within the meaning of section 7701(a)(12)(B).

(e) *Cross Reference.*—

(1) *Returns of federal unemployment tax.*—

For special provisions applicable to returns of tax under chapter 23 (relating to Federal Unemployment Tax), see section 6106.

(2) *Penalties for disclosure of confidential information.*—

For penalties for disclosure of confidential information by any officer or employee of the United States or any department or agency thereof, see 18 U.S.C. 1905.

TREASURY REGULATIONS ON PROCEDURE AND ADMINISTRATION (26 C.F.R.):

§ 301.6103(a)–1. Inspection of returns by certain classes of persons and State and Federal government establishments pursuant to Executive order. (a) *In general*—(1) *Authority.* The President is authorized by subsection (a) of section 6103 to open to public examination and inspection returns in respect of the taxes described in paragraphs (1) and (2) of such subsection. In addition, section 6106 provides that returns in respect of the tax described therein (unemployment tax imposed by chapter 23 of the Code) shall be open to inspection in the same manner, to the same extent, and subject to the same provisions of law, including penalties, as returns of the taxes described in section 6103, except that subsections (a)(2) and (b)(2) of section 6103, and subsection (a)(2) of section 7213 (relating to unauthorized disclosure of information) shall not apply.

* * * * *

(3) *Terms used*—(i) *Return.* For purposes of section 6103(a), the term "return" includes—(*a*) Information returns, schedules, lists, and other written statements filed by or on behalf of the taxpayer with the Internal Revenue Service which are designed to be supplemental to or become a part of the return, and (*b*) Other records, reports, information received orally or in writing, factual data, documents, papers, abstracts, memoranda, or evidence taken, or any portion thereof, relating to the items included under (*a*) of this subdivision. * * *

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